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Memo: Corporate Transparency Act

A new set of federal disclosure requirements will come into effect on January 1, 2024. The Corporate Transparency Act ("CTA") will require companies to identify their beneficial owners, unless the company falls within a list of exemptions. For new entities that are formed on or after January 1, 2024, the CTA filings will be due 90 days following formation. The CTA is intended to combat money laundering and related financial crimes. This Memo describes in general terms what you need to do to comply with the CTA.

Overview

We are writing to let you know (or remind you) that a new set of federal requirements will come into effect on January 1, 2024 under the CTA. The CTA is intended to combat money laundering and related financial crimes. Subject to certain enumerated exemptions, it will require corporations, limited liability companies, limited partnerships, and similar entities that are formed in (or registered to do business in) any of the states of the U.S. to identify their beneficial owners by providing information in an electronic form (a "CTA Submission") submitted to the Financial Crimes Enforcement Network of the U.S. Treasury Department ("FinCEN").

In general, the CTA will apply to any entity that is formed in the U.S. (or to any foreign entity that is registered to do business in the U.S.) by the filing of a document with the appropriate state governmental office (each, a "Subject Entity"). This occurs, for example, when a limited liability company is formed by filing a certificate of formation with a given state's secretary of state.

The CTA provides for twenty-three exemptions, and they should be reviewed carefully if a company believes it may qualify for and intends to rely on an exemption. Among them, many U.S. banks, nonprofit entities, and public companies are exempt. In addition, large private companies are exempt if they (A) have an operating presence at a physical location in the U.S., (B) employ more than 20 full-time U.S. based individuals (not counting employees of affiliated entities), and (C) reported more than $5 million of revenue from U.S. sources on a consolidated basis to the IRS for the previous year.[1]

- Private equity funds often form multiple entities when the fund is established. Many of these entities are exempt from the CTA because they are "pooled investment vehicles"[2] that are (i) advised by a registered investment adviser or an exempt reporting adviser relying on the venture capital fund adviser exemption from registration (a "Covered Adviser")[3] and (ii) identified on their Covered Adviser's Form ADV. Most fund general partners and managers are likely exempt from the CTA as entities that are treated as Covered Advisers. Each fund should carefully review its own situation, however, and should contact counsel if the fund does not clearly fit one of these exemptions. We will be glad to help funds review the new CTA requirements and exemptions.
- Many individuals establish trusts as part of their estate planning. In general, this does not require a CTA Submission, because a trust is not an entity formed by filing a document with a state governmental office.

In the absence of an exemption, a CTA Submission must be made by the Subject Entity.

- For Subject Entities that are formed on or after January 1, 2024, the CTA Submission must be completed within ninety (90) days following formation. FinCEN plans to post the link for submissions starting January 1, 2024.
- For Subject Entities that were formed prior to January 1, 2024, the CTA Submission must be completed by January 1, 2025.
- Some advocacy groups have asked Congress and FinCEN to cancel or postpone these requirements, but it seems unlikely they will do so. If the requirements are postponed, we expect this will be widely reported in the business press.

The CTA provides for civil penalties (up to $500 per day) and criminal penalties (including imprisonment) for willful failure to file.

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We would be glad to help our clients assess how to comply with the CTA. In general, however, Choate is not responsible to make CTA Submissions (including updates) unless we discuss this with you expressly.

Choate may undertake a different approach for certain clients of the Choate Wealth Management Group ("WMG"). For example, from time-to-time Choate partners serve as managers (or the equivalent) of Subject Entities created by our WMG clients ("Managed Subject Entities"). In most of those instances, Choate will plan to make the CTA Submissions for Managed Subject Entities, with cooperation from clients in providing the requisite information regarding the beneficial owners.

Information That Will Be Required

The CTA will take effect January 1, 2024. The first CTA Submissions will become due once new entities are formed thereafter. FinCEN extended this filing date to ninety (90) days after the date of formation.

Final rules have been issued setting out the information that must be included in the CTA Submission.[4] The CTA Submission will require extensive information, generally summarized as follows:

1. *Information on the Subject Entity*:

- The full legal name of the entity, all trade and d/b/a names, and the street address of the entity's principal place of business.
- The jurisdiction of formation and EIN of the entity.

2. *Personal identification for each individual beneficial owner and applicant*:

- The individual's name, date of birth, and residential address.
- A copy of one of the following: (a) a non-expired U.S. passport, (b) a non-expired state, local, or tribal identification document, (c) a non-expired state-issued document, or, if these are not available, (d) a non-expired foreign passport.

According to FinCEN, the information contained in the CTA Submission will not be made available to the public. In general, FinCEN will disclose the information only to federal and state law enforcement agencies and regulators.

Beneficial Owners and Applicants

Beneficial owners include any individual who, directly or indirectly, (i) "exercises substantial control over the entity" (e.g., any senior officer) or (ii) "owns or controls 25 percent of the ownership interests of the entity".[5] These terms are intentionally broad and will likely be broadly construed.

When entities are formed after January 1, 2024, they will also need to submit information about their applicants. Applicants include a maximum of two individuals: (i) the individual who directly files the formation or registration document of the reporting entity, and (ii) the individual who is primarily responsible for directing such filing. Entities that were formed prior to January 1, 2024, will not need to provide information about their applicants.

The Filing Process

We realize that you may work with multiple law firms and other service providers. Sometimes Choate, or another law firm, will form a new entity as part of your legal work. Going forward, if Choate is handling all aspects of a transaction on behalf of a client, we will plan to check whether Choate's client is required to make a CTA Submission in connection with the formation of a new Subject Entity. In other cases, it will be important to specify who is responsible to conduct this CTA Submission analysis.

Then, once the appropriate person has determined that a CTA Submission is required, it will be important for you to specify who is going to prepare the filing and submit it to FinCEN.

- In many cases it will be efficient for you to work directly with a third-party vendor that specializes in government filings. We have been in contact with several such vendors to learn what they offer for CTA Submissions. To date we have spoken with CT Corporation [www.wolterskluwer.com/en/solutions/ct-corporation], Corporation Service Company (CSC) [www.cscglobal.com], SingleFile

[www.singlefile.io] and Cogency [www.cogencyglobal.com]. We would be glad to forward more specific contact information if you would like to have it. We will not be responsible, however, for work performed by the vendor.

- In the alternative, if we discuss this with you expressly, Choate may assist you with preparing and submitting the CTA Submission where Choate creates a new Subject Entity on your behalf. We would charge for this work at our regular hourly rates. We may use a third-party vendor to assist with the filing.
- As previously noted, in most cases Choate will prepare and submit the CTA Submission for Managed Subject Entities related to our Wealth Management Group. We will charge for this work at our regular hourly rates, subject to any mutually agreed alternative fee arrangement. We may use a third-party vendor to assist with the filing.

The information that you submit to FinCEN is likely to change and it may change frequently. For example, one of the beneficial owners might move to a new residential address. Please know that an entity is required to notify FinCEN in the event there is any change to its CTA Submission on file. You will want to establish a process for detecting those changes.

- We expect it would be more efficient for entities to use a specialized vendor (such as one of the vendors mentioned above) to update their CTA Submissions.
- In the alternative, if Choate assisted you with the initial CTA Submission, you could ask us to update the filing and you could send the updated information to us. To be sure, Choate is not responsible to make updated CTA Submissions, unless we expressly agree to assist with the update, and we acknowledge receipt of all necessary information.
- Of course, Choate will not be responsible to detect when there has been a change that requires an update.

In addition to the CTA at the federal level, please be aware that certain states may be enacting similar beneficial owner disclosure legislation, sometimes with different disclosure requirements. Legislation of this nature has been introduced, for example, in California, New York and Pennsylvania. Going forward, you may want to check on the requirements of each state where you form an entity.

Conclusion

Please contact any of your lawyers at Choate if you have questions. We appreciate the privilege of providing legal services to our clients.

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This Memo is for educational purposes and does not establish an attorney-client engagement. Please contact counsel if you need advice in a specific situation.

[1] You can review the full list of exemptions in the statute at 31 U.S.C. §5536(a)(11). It is posted on the FinCEN website at www.fincen.gov/boi/reference-materials [click on Corporate Transparency Act].

[2] Registered investment companies or entities that are exempt from registration under section 3(c)(1) or 3(c)(7) of the U.S. Investment Company Act of 1940.

[3] Investment advisers that are registered at the state level, but not registered with the Securities and Exchange Commission, and exempt reporting advisers relying on the "private fund adviser" exemption under Advisers Act Rule 203(m)-1 (advisers solely to private funds with less than $150 million of private fund assets under management in the U.S.) are **not** Covered Advisers and are not so exempt. Such investment advisers should prepare to make CTA filings in connection with new entity formations in 2024 and for existing funds, management companies and fund general partner or manager entities by January 1, 2025, as discussed in the memo.

[4] You can read these rules at 31 C.F.R. §1010.380. They are posted on the FinCEN website at www.fincen.gov/boi/reference-materials [click on Corporate Regulations].

[5] You can read the precise language of the requirement at 31 U.S.C. §5336(a)(3). It is posted on the FinCEN website at www.fincen.gov/boi/reference-materials [click on Corporate Transparency Act].

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